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No. _____

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Edward Silva, Jr.; Silva Harvesting, Inc.; Ord & Norman; E.O.C. Ord, Inc.; and Edward O.C. Ord, *Petitioners*

v.

United States of America, and United States District Court for Northern California, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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REPLY OF ORD & NORMAN, E.O.C. ORD, INC., AND EDWARD O.C. ORD TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI

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October 27, 1995

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The Solicitor General's Opposition (hereinafter referred to as "SGO") omits the fact that besides the order purging

Mr. Bailin's contempt, the government moved to dismiss any action for contempt. This motion was granted. Thus, the situation remains that the erroneous, prejudicial District Court decision against the firm of Ord & Norman, the professional corporation, and Mr. Ord, the individual remains. This decision is adverse to these parties as is the Ninth Circuit jurisdictional decision which denies review of prejudicial District Court decision. The Ninth Circuit Court of Appeals now requires the experts hired by Ord to go to jail before the firm can test the attorney client and/or work product privileges.

It is not necessary to cite cases including *Hickman v. Taylor*, 329 U.S. 495

(1947), *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 483 and footnote 12 (4th Cir. 1973), holding that the work product privilege belongs to the attorney and his firm, not the client, and that they assert the privilege. The attorney's work product is protected from compelled disclosure in criminal and civil proceedings. See *U.S. v. Nobles*, 422 U.S. 225 (1995) [criminal case] and Fed. R. Civ. P. 26(b)(3). To our knowledge no one disputes these black letter rules of law. Thus, the controversy continues. It is our work product that was deemed discoverable. Mr. Bailin just happened to be in possession of copies of our work product in the continuing engagement which actually continues to this date and will

do so until the ongoing civil investigation is over. As part of the plea agreement Silva admitted to omitting millions from gross income. There will be a continuing civil tax investigation after the criminal case and the same issues are continuing in nature as the government tries to collect any tax debts. These issues include both privileges, the waiver rulings, and the mandatory contempt ruling of the District Court. In fact, as part of the plea agreement, Silva must cooperate in the civil audit during his supervised release. The remaining petitioners are facing a decision of the District Court involving a decision that privileges did not attach and/or broad waiver. In fact, the transcript of the

oral argument before the Ninth Circuit indicates that the Court believed that the District Court decision **was incorrect!** Judge Wallace so stated. Finally, we will have difficulty in getting experts to work for our firm, because now they have to commit contempt to protect the privileges. This decision is hurting our firm, as well as the issues in this petition which are **continuing** in nature.

SGO page 13 footnote 7 is incorrect. In the record below transcripts of the IRS summons and hearing are in the record where we asserted the twin privileges before the hearing officer Special Agent, and we made a *Reisman v. Caplin*, 375 U.S. 440 (1960) good faith refusal to answer or comply with record demands. Instead of

enforcing the IRS summons to obtain an enforcement order, which is a final appealable order, the IRS got around this requirement by going directly to the local U.S. Attorney and procuring and shifting to a grand jury subpoena.

Our petition clearly shows that the state of the law cries out for a **uniform** rule from this Court so every law firm in the country is treated equally for the purposes of attorney client and/or work product privileges. It should not turn on such whimsical factors as whether a particular expert hired by the attorney is willing to go to jail so the privilege can be tested. Nor should this important privilege which goes to the tap root of giving persons **honest** advice turn on the

circuit in which the investigation happens to take place.

The issues here are of an important nature nationwide. Thus, the Court should accept the case for review. In a proceeding that may otherwise be deemed moot, Courts have discretion to resolve an issue of continuing public interest that is likely to recur in other cases. *Liberty Mut. Ins. Co. v. Fales*, 8 Cal. 3d 712, 715-716, 505 P.2d 213 (1973). It is particularly appropriate when it is likely to affect the future rights of the parties. These conditions are applicable here as indicated above.

Moreover, omitted from the long dissertation on mootness by the SGO is the large body of case law denying mootness in

facts and circumstances similar to the instant appeal. The denial of mootness generally occurs when three elements are present. They are: (1) repetition of the official acts that provoked the litigation, (2) the risk that effective remedies cannot be provided in the event of repetition, and (3) the individual plaintiff will be affected in the event of repetition. Southern Pacific Terminal Company v Interstate Commerce Commission, 219 U.S. 498, 515 (1911); 13A Wright & Miller §3533.8.

All of these elements are satisfied in the present case. First, the official acts which provoked this case will undoubtedly be repeated. Although the criminal charges have been settled, the

civil tax case continues in the District Court, and the existing District Court decision continues to apply to the petitioners.

Under judicial notice, this Court is aware that government will continue to issue grand jury subpoenas seeking to invade the attorney-client and work product privileges. As a matter of fact, the Department of Justice has developed litigation strategies to do just that. Further, the case law is replete with examples of such governmental conduct.

Such conduct will undoubtedly continue against Ord and his firm. This is already the IRS's second attempt to invade the attorney-client and work product privileges by means of a grand

jury subpoena.

Second, in the event the IRS repeats such conduct, Ord and his firm will not have an effective remedy. As the Ninth Circuit decision currently stands, a hired expert must face contempt charges and jail time before the attorney-client and work product privileges can be tested. Since no hired expert will ever do this, there is no effective remedy.

Further, the Ninth Circuit decision actually encourages the government to invade the attorney-client and work product privileges. After all, the government knows that no hired expert will face contempt charges and jail time so the privileges can be tested with no guarantee of the outline. In essence, then, the

Ninth Circuit decision encourages governmental overreaching--overreaching which evades review permanently unless this Court takes this case and makes a uniform rule.

Finally, it is certain that the IRS will rely on District Courts decision in the civil investigation. Thus, the attorney-client and work product privileges, Ord and his firm will be affected due to the continuing nature of the civil tax investigations against petitioners, and due as well to the existing case against Ord & Norman which the Ninth Circuit has said was incorrectly decided. Further, as mentioned above, Ord and his firm have been summoned twice before, and it will undoubtedly happen

again.

It should be noted that Ord and his firm are not the only parties to be affected by the Ninth Circuit's Decision. Indeed, this is an area of the law which cries out for nationwide uniformity. This is one of the points of our appeal. The important issues of privilege arising in this case should not turn on whether a hired expert serves jail time or on the Circuit from which the subpoena is issued.

Moreover, the instant case should be covered by the reasoning and concepts of *Church of Scientology*, 113 S.Ct. 447 (1992), especially as this Court has repeatedly stated in cases where the District Court's **enforcement** powers were upheld that the IRS summons is the **legal**

equivalent of the grand jury subpoena, and orders from the enforcement of an IRS summons are final appealable orders. See our petition pages 32-35, and footnote 9.

We have been hurt by the incorrect decision of the District Court and the jurisdictional decision of the Ninth Circuit. We are all parties before the Courts below and in this Court and continue to have standing to challenge the erroneous decision of the Circuit denying us review of a District Court decision which the Ninth Circuit indicated was erroneous, is a final appealable Order. Likewise, the tax dispute continues and is part of the "dodging" discussion at SGO at p.12-13 which ignores the fact that under either the summons or the subpoena it is

the **order using the Court enforcement powers** that is at issue and being appealed. Thus, CSGO the type of legal process which causes the Court enforcement is not material. Thus, the discussion on pp. 12-13 is completely besides the point. Moreover, as indicated in our Petition on p.32-35 and the cases in footnote 9, this is why this Court treats both types of subpoena/summons **exactly** the same legally for Court order **enforcement** purposes!

As this Court stated in U.S. v. Powell, 379 U.S. 48, 57 (1964) concerning the sameness of an IRS Summons and a Grand Jury Subpoena:

> The administrative investigative function, in searching out violations with a view to enforcing the Act is essentially the same as the Grand Jury's or the Court's issuing other

> pretrial orders for the discovery of evidence.
>
> The administrative agency has the power of inquisition...[which] is more analogous to the Grand Jury, while the power of the Commissioner of the Internal Revenue derives from a different body of statutes, we do not think they are analogous to the other agency situations without force...It is the Court's process which is invoked to enforce... . (emphasis added)

Thus, it makes no difference if the process sought to be enforced is grand jury or an administrative summons, because it is the enforcement order that is at issue. We are parties before the Courts below and continue to request relief over a continuing matter involving the sanctity of our files protection of experts we hire and the continuing process in the civil tax case.

If the Court wishes us to file the transcript of the IRS summons hearing before the grand jury was issued or the transcript of the oral argument before the Ninth Circuit which is also part of the record in the District Court we will be happy to do so. We can also document from the record the other factual errors cited above as requested.

As indicated in our petition, the writ process certainly should have been allowed as it traditionally is used to avoid the compelled waiver of common law privileges as the bell cannot be unrung.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I, Edward O.C. Ord, declare as follows:

That I am employed in the County of San Francisco, State of California, I am over the age of eighteen years, and not a party of the within action. My business address is 650 California Street, 26th Floor, San Francisco, CA 94108.

On ~~October~~ November 3, 1995, I served the within **REPLY OF ORD & NORMAN, E.O.C. ORD, INC., AND EDWARD O.C. ORD TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI** on the interested parties in this action, by placing a true and correct copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box, addressed as follows:

Solicitor General
Department of Justice
Washington, DC 20530

G. William Hunter, Esq.
1300 Clay Street, Suite 510
Oakland, California 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ~~October~~ November 3, 1995, at San Francisco, California.

Edward O.C. Ord

Edward O.C. Ord